AUG 11 2010
OFFICE OF THE CLERK

No. 09-1509

IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD., *et al.*,

Petitioners,

v.

MERCEDES BENZ, U.S.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CONTEMPORARY MOTOR CARS, INC.

PETER A. EFROS
EFROS & WOPAT
130 Maple Avenue
Suite 10B
Red Bank, NJ 07701
732-747-8555
efrosandwopatlaw@verizon.net

Counsel for Respondent Contemporary Motor Cars, Inc

23150

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the petition, relying on pre-*Daubert* antitrust authorities, fail to raise any significant issue regarding the district court's exclusion of expert testimony and grant of summary judgment?

PARTIES TO THE PROCEEDING

Contemporary Motor Cars, Inc., Mercedes Benz, USA, David Michaels Motor Cars Corp. and Ray Catena Motor Cars Corp. are the Respondents.

Coast Automotive Group and Tamin Shansab are the Petitioners.

CORPORATE DISCLOSURE STATEMENT

Contemporary Motor Cars, Inc. has no parent corporation. It is privately held and not publicly traded.

RELYING ON PRE-*DAUBERT* AUTHORITIES, THE PETITION FOR WRIT OF CERTIORARI FAILS TO SET FORTH ANY REASON FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

Petitioners' attempt to convince the court that the Third Circuit's and the district court's application of the gatekeeper requirement of *Daubert* v. *Merrill Dow Pharmaceutical*, 509 U.S. 579, 113 S. Ct. 2786 125 L. Ed. 2d 469 (1993) disregarded this court's holding in *Story Parchment* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248 75 L. Ed. 544 (1931) and *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1991).

There is nothing in either *Daubert* or *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), or Fed. R. Evid. 702 to suggest that antitrust claims like petitioners' are exempt from the district court's gate keeping responsibilities for expert testimony. Petitioners make no serious attempt to square their *Story Parchment* "fact of injury" analysis with *Daubert* and Fed. R. Evid 702, and they fail to point to any post *Daubert* authority that exempted a damage expert in an antitrust case from *Daubert*'s requirements.

Significantly, petitioners place great emphasis on *J. Truett Payne* v. *Chrysler Motor Cars Corp.*, 451 U.S. 557 (1991). There the Fifth Circuit had reversed a jury's verdict and held that the petitioner's damage proofs were insufficient. The Court reversed and remanded to the Fifth Circuit to determine whether Chrysler violated

the Sherman Act and if so, whether petitioner's damage proofs were sufficient. "Once a violation has been established, that burden is somewhat lightened." 451 U.S. at 568.

On remand, however, the Fifth Circuit held that the petitioner had failed to show sufficient fact of injury to entitle it to the safe harbor of the relaxed damages rule of *Story Parchment*. Payne's expert assumed a good will value of the dealership which "was not based on an examination of Payne's financials" and was ". . . an unsupported estimate by Mr. Payne. . . . In calculating the going concern value, the plaintiff's expert failed to document his basic assumptions or to consider local market conditions." 670 F. 2d at 582.

In this case, the district court, in barring the petitioners' expert report of Mr. Markowitz, found the same fault as did the Fifth Circuit on remand in *J. Truett Payne*:

> "Based on Markowitz's own admissions, he relied on factual assertions and assumptions provided by Shansab without doing any independent analysis and without providing a factual basis for his conclusion that Coast was damaged by unfair allocation." Opinion of the United States District Court for the District of New Jersey, Petition, Appendix C at 49a.

Therefore, the district court applied long standing principles in excluding petitioners' damage experts. In *J. Truett Payne* v. *Chrysler Motor Cars*, the Fifth Circuit

on remand performed the same type of analysis as the district court in 2006. The district court, as affirmed by the Third Circuit, applied well established principles. The petition presents no significant issue that would justify this Court's exercise of its discretionary jurisdiction.

ADOPTION BY REFERENCE

Respondent Contemporary Motor Cars, Inc. respectfully incorporates by reference the responsive arguments of other Respondents.

CONCLUSION

For these reasons, we respectfully request the petition be denied.

Respectfully submitted,

Peter A. Efros
Efros & Wopat
130 Maple Avenue
Suite 101
Red Bank, NJ 07701
732-747-8555
efrosandwopatlaw@verizon.net

Counsel for Respondent
Contemporary Motor Cars, Inc.